No. 77-142

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD LAVERN CULBERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. The court of appeals' novel interpretation of the Hobbs Act, 18 U.S.C. 1951, in this case has recently been rejected by two courts of appeals in cases not cited in the government's petition. In *United States* v. *Warledo*, 557 F. 2d 721, 730 (C.A. 10), the Tenth Circuit rejected the contention that the Hobbs Act is limited to labor racketeering, concluding that "[t]he Act proscribes all forms of extortion affecting interstate commerce." And in *United States* v. *Frazier*, C.A. 8, No. 77-1195, decided August 5, 1977, the Eighth Circuit expressly refused to follow the decision in the instant case on facts nearly identical to those here. Frazier, like petitioner, attempted to extort money from a federally insured bank by means of threats to blow up a bank employee or his family. The court concluded "that the Hobbs Act means what it says" and that it was "unpersuaded that anything in the legislative history of the Act requires a more restrictive interpretation" (slip op. 4).

As respondent himself concedes (Mem. in Opp. 4), the law on the scope of the Hobbs Act is now uncertain, and the conflict between the circuits is clearly established.[1] Because this uncertainty will substantially impair federal prosecutions under this major criminal statute, this issue warrants review.

2. Petitioner contends, however, that the limitation by the Ninth Circuit of the Hobbs Act to racketeering is essential to prevent "a broad encroachment on the sovereignty of the states" (Mem. in Opp. 4-5). Whatever the merit of respondent's argument with regard to hypothetical Hobbs Act prosecutions for the hold up of a neighborhood liquor or grocery store, where there may be a "de minimus burden on interstate commerce" (Mem. in Opp. 4), the facts of this case demonstrate a clear federal interest in the protection of a federally insured bank, surely one of the primary channels of interstate commerce. As the instant case and *United States* v. *Frazier, supra,* demonstrate, many prosecutions under the Hobbs Act involve this unquestionable nexus with interstate commerce. Indeed, respondent has suggested only one example[2] to support his contention that the danger of a wholesale invasion of state sovereignty is so great that it requires the judiciary to add the new and undefined element of "racketeering" to the Hobbs Act.

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[1]Since the filing of our brief the Ninth Circuit has dismissed another Hobbs Act prosecution under the authority of *Culbert. United States* v. *Missman,* C.A. 9, No. 77-1106, decided August 3, 1977.

[2]*United States* v. *Yokley,* 542 F. 2d 300 (C.A. 6). The indictment charged that Yokley and a confederate forced their way into the home of the manager of a K-Mart store. One gunman held the family hostage while the other accompanied the manager to the store, where he forced the manager to open the safe. 542 F. 2d at 301-302.

Moreover, even if respondent is correct and there are some fact situations falling within the literal language of the Hobbs Act but in which there is no substantial federal interest, requiring proof of racketeering will not serve to screen out such cases. Although the court of appeals has not clearly defined racketeering, there is nothing inherent in the concept that suggests that racketeers would prey only upon businesses heavily involved in interstate activities or that the concept would otherwise meaningfully restrict Hobbs Act prosecutions to crimes in which the federal government may be thought to have a substantial rather than a slight interest. The requirement that the government prove racketeering thus seems to have little or nothing to do with a legitimate concern for state sovereignty.

For the reasons discussed in this memorandum and in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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